

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

INCOME TAX APPEAL NO. 702 OF 2003

M/s.Chem Amit

Appellant

vs.

The Asst. Commissioner of Income-Tax,
Circle 7(1), Mumbai

Respondent

Mr.K.Gopal for the appellant.

**CORAM : R. M. LODHA &
J.P. DEVADHAR, JJ.**

DATED : 23rd November 2004

ORAL ORDER (Per R.M. Lodha, J.).

Heard Mr.K. Gopal, the learned counsel for the
assessee.

2. The assessee has preferred this appeal under Section 260A of the Income Tax Act 1961 aggrieved by the order dated 24th April 2003 passed by the Income Tax Appellate Tribunal, "H" Bench, Mumbai on the application under Section 254(2) seeking rectification of mistake in the order of the Tribunal dated 24th October 2002.

3. Section 260A of the Income Tax Act provides for appeal to the High Court and the said provision reads thus:

"260A. (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is

satisfied that the case involves a substantial question of law.

(2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be -

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief Commissioner or Commissioner;

(b) ...

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as

is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

4. What is provided by sub-section (1) of section 260A is that every order passed in appeal by the appellate Tribunal involving substantial question of law is amenable to an appeal to the High Court. Sub-section (1) of Section 254 provides that the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The expression, 'An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal' obviously is referable to such order passed under section 254(1). An order passed by the Tribunal on the application for rectification under section 254(2) rejecting rectification application cannot be said to be an order passed in appeal by the Appellate Tribunal within the meaning of section 260A(1).

5. Mr.K.Gopal, the learned counsel for the assessee, however, relied upon the judgment of the Supreme Court in the case of Commissioner of Income-tax v. Durga Engineering and Foundry Works, 245 ITR 272 and submitted that an order passed by the Appellate Tribunal on the

application for rectification is an order passed in appeal by the Appellate Tribunal.

6. In Durga Engineering and Foundry Works, the Supreme Court held that the reference under section 256 of the Income Tax Act, 1961 could be made from the order of the Appellate Tribunal passed on the application for rectification under section 254(2). That was so held by the Supreme Court in the light of the language of Section 256 which empowered the assessee and the revenue to "require the Appellate Tribunal to refer to the High Court any question of law arising out of an order passed under section 254". Section 254 comprises of two subsections. Subsection (1) of Section 254 provides that the Appellate Tribunal may pass such order on an appeal as it thinks fit after giving both the parties to the appeal an opportunity of being heard. Subsection (2) of section 254 permits the Tribunal to rectify any mistake apparent from the record and amend any order passed under subsection (1) within four years from the date of the order. The expression employed in Section 260A that provides for an appeal to the High Court is materially different from the expression used in section 256 that empowers the assessee and the revenue to require the Appellate Tribunal to refer to the High Court any question of law. As already noticed above, in Section 256 the expression used is, "require the

Appellate Tribunal to refer to the High Court any question of law arising out of an order passed under section 254". However, in section 260A the legislature has not provided an appeal to the High Court from every order passed under section 254 but has confined it to the order passed in appeal by the Appellate Tribunal. This is made clear by the use of the expression, "An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal". If the legislature intended to provide an appeal to the High Court from the order passed by the Appellate Tribunal on the application for rectification under section 254(2), the legislature would not have used the expression in Section 260A that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, but instead used the expression as is used in Section 256 that an appeal shall lie to the High Court from every order passed under section 254. The expression, "an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal" in section 260A cannot be equated with the expression, "an appeal shall lie to the High Court from every order passed under section 254.". In Durga Engineering & Foundry Works also the Supreme Court observed that section 256 contemplates the reference of the question of law arising out of an order passed under section 254; that is to say, an order passed both under section

254(1) and section 254(2). We have already highlighted the departure of the language in section 260A from the language occurring in section 256.

7. In a given case where as the consequence of an order passed on the rectification application under section 254(2), the amendment in the order passed in appeal under section 254(1) takes place, such amended order in appeal as a consequence of the order passed in rectification application, however, shall be amenable to appeal under section 260A. In so far as the present case is concerned, the assessee has only challenged the order of the Appellate Tribunal rejecting the application of rectification, the appeal under section 260A is not maintainable.

8. The appeal is dismissed accordingly.

(R.M. LODHA,J.)

(J.P. DEVADHAR,J.)